SUPREME COURT, U. S.

MAY 19 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 750

SALVATORE GRANELLO and HYMAN LEVINE,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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IN THE

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No. 750

SALVATORE GRANELLO and HYMAN LEVINE,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

On the 24th day of April, 1967 this Court denied the petition for Certiorari to the Second Circuit, three justices dissenting and one Justice (Mr. Justice Brennan) not participating.

On the 25th day of April, 1967, Petitioners filed an application for a Stay pending the filing and serving and determination of the instant Petition for rehearing within the time allotted by the rules of this Court.

On the 28th day of April, Mr. Justice Harlan granted the petitioners' application for a Stay.

POINT I

Birrell has furnished petitioners with a letter unequivocally confirming the fact that his law firm had represented them as attorneys; had received a number of papers and documents from them in a confidential capacity; and that not only were these among the documents unlawfully seized by the government from Birrell, but that Birrell had advised the prosecutor of exculpatory matter among those records before the trial.

The brief of the Solicitor-General in opposition to certiorari referred to the fact (Gov't Br. p. 15) that the letter Birrell had previously sent to Petitioners had not answered a crucial question about the Pacheco stock. It also contended that Petitioners failed to "establish" that Birrell represented them as an attorney (Gov't Br. p. 6).

In a letter sent to one of the Counsel for Petitioners, in response to a letter sent to Birrell's attorney, Birrell has not only confirmed the fact that he represented petitioners; that confidential records entrusted to him as an attorney were unlawfully seized by the government; that exculpatory material was contained in those seized records, but that the prosecutor was told of all this *before the trial* of the cases herein in the district court. The prosecutor failed to advise petitioners of this fact (*Brady* v. *Maryland*, 373 U.S. 83).

This letter, dated May 8, 1967, is annexed to this petition for rehearing and is marked exhibit 1.*

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* Naturally Birrell's attorney was advised of his letter. His attorney indicated that the decision to send the letter was Birrell's and was contrary to his counsel's advice. Birrell, of course, had asserted the privilege against self-incrimination at the trial herein when called as a witness. The letter is being used as it bears materially on the instant case.

This letter in itself is of such importance that it tends to confirm many of the matters which petitioners maintained are manifest from the record itself. More than this however, it unequivocally confirms the attorney-client status of the petitioners and Birrell, and indicates that there was apparently a conscious suppression of possibly exculpatory information by the prosecutor in charge of the case, now no longer an assistant U.S. Attorney. This prosecutor also kept Exhibit NN from the jury.

To further substantiate an apparently calculated suppression of evidence in connection with the illegally seized Birrell records, this Court's attention is directed to the proceedings in the Southern District of New York before Judge Herlands on April 27, 1967 in the case of *United States* v. *Birrell,* 61 Cr. 692.

At that date, counsel for other defendants convicted on the illegally seized Birrell records also stated that the government had refused or failed to give his clients the Birrell inventory and apparently intentionally have been suppressing it.

In *Exhibit 2,* a *shocking* and incredible colloquy is partially set forth from the minutes of April 27, 1967.

POINT II

The government had never advised the petitioners herein that they had an inventory of the voluminous Birrell records which were seized. It appears however that an inventory indeed existed which was apparently available to the government (about 300 pages long) but which was never shown to the petitioners. Without it, looking through the massive Birrell records was like looking for a "needle in a haystack".

As was already pointed out in the Reply to the Government's opposition to Certiorari, one of the counsel for Petitioners in the District Court had unsuccessfully sought an inventory to the massive Birrell records which were stored in a room "twice the size" of a Court room. Petitioners have been advised that in the case of *United States* v. *Birrell,* 61 Cr. 692 (S.D.N.Y.) an inventory of some 300 pages was made part of the record.* This inventory is of the very records which petitioners sought to peruse. Apparently it existed since 1961—*before the trial herein.* The minutes of proceedings before Herlands, D.J., in *U.S.* v. *Birrell, supra,* on March 14, 1967 reflects this fact.

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* The minutes of April 27, 1967 in *U.S.* v. *Birrell,* 61 Cr. 692 (S.D.N.Y.) indicate that the inventory is still not available to Petitioners or anyone else except the government and Birrell's attorney (S.M. 4/27/67 pp. 194, 195).

The Birrell cases clearly show that relevant matters affecting the petitioners were withheld from Granello and Levine. These include the existence of an inventory of the seized records which was prepared by the government in 1961 and the fact that relevant records affecting the petitioners had been among the papers seized.

In the case of *United States* v. *Birrell* pending in the Southern District of New York, 61 Cr. 692, Assistant U.S. Attorney Arthur L. Liman submitted an affidavit in February 1967 or thereabouts which specifically indicated that in *July and August 1961 he personally had supervised the preparation of a 300 page inventory of the seized Birrell records. This inventory was never shown to the petitioners during trial and its existence was never disclosed to counsel.*

In addition, the Memorandum of Law which was submitted by the U.S. Attorney in that same case at approximately the same time as the affidavit, states on pages 1 and 2 thereof that the seized property (records and papers unlawfully taken from Birrell) which was ordered suppressed by Judge Wyatt consisted of "over a million documents".

On June 28, 1965 however, another Assistant U.S. Attorney, Paul R. Grand, stated before Judge Wyatt of the District Court in the Southern District of New York in the case of *U.S.* v. *Birrell,* 61 Cr. 200 (at page 69 of those minutes) that the inventory which the government knew about had been drawn up by the firm of Simpson, Thacher & Bartlett, and that the firm had been "reluctant in the past to make it available". Further, Mr. Grand stated "the government has a very sketchy inventory that would not be adequate for these purposes".

When this is compared with the affidavit of Assistant U.S. Attorney Liman in February 1967, that he supervised the preparation of a 300 page inventory in 1961, it certainly is inferrable that there may have been a calculated design to keep relevant evidence from the petitioners herein.

In connection with the affidavit and Memorandum of Law prepared and submitted by Mr. Liman, a hearing was held before District Judge Herlands in the *Birrell* case, 61 Cr. 692, in the Southern District of New York on March 14, 1967. At that time, it appears that the documents which were seized unlawfully from Birrell which were relevant in the petitioners case herein *consisted of between 1 and 2 million documents* (see, 61 Cr. 692, page 97 of the minutes of March 14, 1967).

In addition, those minutes (March 14, 1967) indicate that the inventory which the government had prepared, consisting of 300 pages, was filed with the court but the petitioners herein have been unable to obtain a copy of it even now although Birrell has advised counsel to the petitioners that there were many relevant documents concerning the petitioners among those seized records (see Exhibit I *infra*).

From the foregoing, it is patent that in addition to the record of the trial, there are other filed papers in the Southern District of New York which corroborate fully the statement that evidence was knowingly suppressed by the government; that the government failed to advise petitioners of possible exculpatory material; that a 300 page inventory of the Birrell records was withheld from the petitioners; and that the U.S. Attorney actually had prepared such an inventory as early as July and August 1961 which *was well before the trial of the petitioners.*

It should also be noted that Granello and Levine were officers of Pacheco Oil and Mining Co. which company was also represented by Birrell. The search warrant used in the unlawful search and seizure of Birrell records specifically included the Pacheco records. (See Exhibit A attached to Feb. 1967 affidavit of Assistant U.S. Attorney Liman in *U.S.* v. *Birrell*, 61 Cr. 692.)

This in itself should shock the conscience of this Court and by this petition for rehearing it is being called to the attention of the Solicitor General.

All of the foregoing, coupled with the unlawful eavesdrop and letter of Birrell "dovetails" with the use of admittedly illegally acquired evidence. The rights of the petitioners were grossly violated. Not even an evidentiary hearing was afforded to them. At least an evidentiary hearing should be directed.

POINT III

The petition for certiorari should be reconsidered with the participation of all nine justices. Since it cannot be doubted that the gravest and most far-reaching constitutional issues frequently turn on the vote of a single member of this tribunal, it is highly prejudicial and unfair to any party to deprive him, for any reason, of the participation of nine justices.

—A—

In the case at bar, it is the belief of the petitioners that their former attorney, Lowell Birrell, is in no way a litigant in this case and cannot be affected one iota by its outcome. The petitioners have no reason to ask for the disqualification of any justice and cannot believe that the Solicitor-General sought such disqualification.

The petitioners were terribly chagrined and shocked to learn that their petition had been denied, not necessarily because it lacked merit, but because a Justice of this Court had removed himself from the voting. There can be no doubt but that such removal was motivated by the highest ideals of fairness and impartiality. By the same token it may possibly have also worked to the severest prejudice of the Petitioners.

Naturally no reason was given why a Justice had not sat on the question of granting certiorari, but the New York Times on April 25, 1967 carried an article confirming Petitioners' surmise that it was on account of the coincidence that a Justice's son had been assigned to represent Lowell Birrell, Esq., the former attorney of the Petitioners, the unlawful seizure of whose records, resulted in the indictment and conviction of Petitioners.

This Petitioners feel, is a tragic and needless result of such representation. Petitioners are unaware of any case wherein they and Birrell are jointly indicted. Under no circumstances can it be reasoned that Birrell is in any way a litigant in the instant case before this Court. Petitioners cannot fathom how the outcome of the matter at bar could possibly affect the result of any case in which Birrell is presently involved. The possibility that a new principle of law may be laid down by this Court would affect innumerable cases, possibly including one that Birrell is involved in, but that does not mean that he is "involved" in this case, any more than any other party whose rights may thereby be affected.

The counsel now representing Birrell who is related to a Justice apparently was not even the attorney for Birrell when this case was tried in the District Court. Even then, however, Birrell was not a party herein. He is in no way connected as a litigant now.

On April 24, 1967, with the consent of Birrell's counsel, counsel for Petitioners spoke with Birrell and were advised that when his present lawyer was assigned to him in the District Court in a completely disconnected matter, he was told that if he accepted the assignment he would have to forego the opportunity of having this attorney's father sitting in review of his case if it ever got to the Supreme Court. Birrell could not possibly bind Petitioners herein since there was no connection with them, and the cases are completely different and separate.

Petitioners recognize that it is impossible to prognosticate how a particular Justice will vote. That however is not the issue. The same would apply to a jury. If a juror de-

cided to abstain for any reason in a criminal case, there could be no verdict especially where the defendants objected. Any contrary result would require a de novo consideration of the case.

The petitioners have the highest regard and respect for every Justice in this Court. They are confident that this tribunal will not take umbrage at the position advanced herein and will not think less of the merits of petitioners' case because they request a rehearing with all nine justices participating.

While the cases are not parallel in many respects, it was hoped that the Justice who omitted to participate might have voted favorably to petitioners' petition for certiorari in view of his vote in such cases as *McCray* v. *Illinois*, —— U.S. —— (3/20/67).

His vote in other cases indicated a line of reasoning which is sympathetic to that of the three Justices who voted for Certiorari.

Since there does not appear to be any actual connection between Birrell's cases in the District Court and the present matter here, it is just beyond comprehension that this unfortunate coincidence should perhaps result in denying a review in this Court.

An alternative, (although not necessary herein for the foregoing reasons) might be to *"vouch-in"* a ninth Justice where one disqualifies himself or at least to relax the "four-justice" rule when a member of this Court removes himself from participation. After all, more than a third of the justices sitting voted in favor of granting Certiorari herein.

In the constitutional field of search and seizure, the omission of a single Justice to participate in the case, ordinarily *foredooms one of the parties to failure* in his cause by reason of that fact alone. This is because many of these cases turn on a single vote (e.g. *McCray* v. *Illinois, supra, Mapp* v. *Ohio*, 367 U.S. 643).

Petitioners recognize that it may be an extraordinary suggestion to have a justice participate after first omitting to do so, but they are equally confident that if it should become manifest that an injustice was thereby occasioned, or a misunderstanding was involved, any member of this Court would not hesitate for a moment to rectify such a calamity. It is further submitted that the Solicitor-General, whose fairness is renowned, and who on his own instance called this Court's attention to an unlawful eavesdrop in this very case, would not for a moment question such a procedure if it were in furtherance of justice.

It is inferable that certiorari might well have been granted except for the unfortunate and apparently unrelated coincidence which has been detailed in the preceding passages.*

---

* The government conceded this case does not involve Birrell (Gov't Br. 4, 10).

POINT IV

The self-serving declaration by the government that nothing relating to this case was discovered by the illegal eavesdrop of co-defendant Levine entitles the petitioners at least to a hearing and should grant them a new trial. The *Jencks* rule entitles petitioners to make an independent determination of whether the eavesdrop was material to the case and whether they were thereby prejudiced. Any other determination makes a mockery of the *Jencks* rule.

In the highest traditions of fairness, the Solicitor-General conceded error and acknowledged that a microphone was planted by trespass and used against Petitioner Levine. By a self-serving statement, the Solicitor-General states that nothing relevant to this case was thereby discovered. But this statement is not binding upon the Petitioners who were *unaware* of the eavesdropping. The case of *Jencks* v. *United States,* 353 U.S. 657, and the *Jencks* statute, 18 U.S.C. §3500, entitle the Petitioners to make an independent determination of this fact. What good is the Jenck's statute in this case if the Court is going to accept, at face value, the self-serving declaration of the *adversary?*

The Petitioners asserted that exculpatory material had been given to their attorney Birrell in a confidential capacity and that he had indeed been their attorney. Why should this not also be taken at face value? The Petitioners have now produced material evidence attesting to this fact, but the government has done no such similar thing. It may well be that "poisoned fruits" of the eavesdrop were used against Petitioners. (*Nardone* v. *United States,* 308 U.S. 338.)

To permit this self-serving statement to thwart inspection by the Petitioners with the benefit of a full hearing thereon in essence makes a mockery of the *Jencks* statute and will be taken as a retreat from the holding in *Jencks* v. *United States*. As the dissenters in the original petition noted, this is *"dirty business"* and a full hearing is warranted. A new trial alone is the proper remedy in view of all the other *"dirty"* aspects of this prosecution. (*Black* v. *United States*, 385 U.S. 26.)

POINT V

The government's brief in opposition argues that exploratory searches without search warrants or with void warrants should be condoned and encouraged. There is no dispute that the evidence against petitioners consisted exclusively of illegally seized Birrell records which evidence was ordered suppressed and returned to Birrell as it was *not* contraband.

The Government cites *Wong Sun* v. *United States*, 371 U.S. 471 as the foundation for its contention that unlawfully seized evidence, be it by exploratory search or otherwise, may be used against the entire world, except the immediate victim of the illegality.

The Petitioners maintain that the *Wong Sun* case is incapable of any such interpretation and that in any event, this Court should act to correct any such assumption, since otherwise the Fourth Amendment will be relegated to a meaningless platitude and substantially devoid of any protection to the individual. (*People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855; *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385.)

Moreover, in *Wong Sun* v. *United States*, the evidence seized was *contraband* whereas herein it was *non-contraband*. When the government used this against the Petitioners, the prosecution was clearly using the "fruits" of a poisonous tree.

No evidentiary hearing was permitted and no hearing was held on the representation of a defense attorney in open court (an "officer of the Court") that there had been an attorney-client relationship between petitioners and Birrell (See Exh. I). It is possible that at an evidentiary hearing outside the presence of the jury, evidence would have been adduced by the defense that would have established the illegality of the use of the Birrell records. But to arbitrarily deny a hearing on the basis of lack of "standing" where the evidence has been *held* to have been illegally seized and has been ordered suppressed and returned, is the grossest violation of petitioners' rights imaginable.

The instant case will undoubtedly be used to bolster the belief, which the Government already acts upon, that it may search with impunity and without warrants, just so long as it does not use the evidence against the one person who is the immediate victim of the illegality.

POINT VI

The issues in the case at bar are so important that a determination of this Court is imperative. The clear position of the government is that the Fourth Amendment is no longer a bar to warrantless searches and seizures, so long as the so-called "immediate victim" is not prosecuted; but the government may search with impunity and use the evidence thus acquired against the whole world except the "victim".

Since non-contraband evidence was used against petitioners—evidence which was ordered suppressed and returned to the victim, the attorney, Birrell, it is clear that the government may now invade any premises, including a court, a lawyer's office, a physician's office, or even the chambers of a minister, and seize any material it wishes for use against anyone except the victim.

For the purpose of this consideration, it must be assumed that Birrell was the attorney for Petitioners as he himself now admits. But even without that, the representation of the Petitioners' attorney that an attorney-client relationship existed should have been sufficient to warrant a hearing as he is an "officer of the court".

This case of necessity will encourage the lawless enforcement of the law. What man is now safe? What value is the Fourth Amendment? The government now has "carte blanche" to use electronic eavesdropping and unlawful searches and seizures. If it merely asserts that in *its opinion* as an *adversary* the evidence was not relevant, apparently this Court will stifle further inquiry and will deny even a hearing on the grounds of "lack of standing".

This case has other important issues as well which merit review, but the foregoing alone should impel at least the granting of certiorari so the crucial problems posed herein may be clarified.

CONCLUSION

The petition for certiorari should be granted upon reconsideration of the petition.

Respectfully submitted,

IRVING ANOLIK
IRWIN KLEIN
IRWIN GERMAISE
Attorneys for Petitioners

IRVING ANOLIK
of Counsel

Counsel certifies that the Petition For Rehearing is made in good faith and not for the purpose of delay.

.....

Irving Anolik

Exhibit I

New York, New York
May 8, 1967

Irving Anolik, Counselor at Law
6 East 45th St.
New York, N. Y. 10017

Dear Mr. Anolik:

This letter is in reply to your letter of April 18, 1967 to Mr. William J. Brennan, III, a copy of which was sent to me.

Referring to your specific queries:

1. I was an attorney at law and senior partner of the firm of Birrell and Larson. The firm of Birrell & Larson represented Salvatore Granello and George Levine in various matters during the period from 1954 through 1957.

2. The firm of Birrell & Larson received many confidential papers and documents in their capacity as attorneys for Messrs. Granello and Levine.

3. The complete files and records of Birrell & Larson were illegally seized by the United States Government. They have been represented as being intact in the possession of the United States Attorney for the Southern District of New York.

4. If and when any of these papers and documents of Messrs. Granello and Levine are returned to me, I will be glad to return them.

5. On November 24, 1965, I wrote to Mr. Irwin Klein about this matter; I described in a general way some of the records and I enclosed a copy of the minutes of a directors meeting of Lomega Gold Mines, Ltd. (See exchange of correspondence with Mr. Klein enclosed.) I told Mr. Charles G. Stillman, the Assistant in charge, prior to the trial of the cases against your clients, that there were definitive agreements and books and records to show conclusively that I never purchased for my individual or personal account any Pacheco stock from Messrs. Granello and Levine; that Lomega Gold Mines Ltd. of Canada had acquired the assets of the Pacheco Petroleum Company of Cuba. I also told Mr. Stillman that the books of account and general ledger of Birrell & Larson would reflect the true transaction which took place. The meeting with Mr. Stillman was at the United States Courthouse and there were present two IRS agents, Passarelli and Ferisi, my lawyer, Mr. William B. Pennell and I think also my other lawyer, Mr. Menahem Stim.

Very truly yours,

/s/ LOWELL M. BIRRELL
Lowell M. Birrell

Exhibit II

Excerpts from minutes of proceedings before Herlands, D.J. in *United States* v. *Birrell*, 61 Cr. 692 (S.D.N.Y.) on April 27, 1967:

Pp. 186, 187:

> "The Court: Mr. Spieler, I have received from Daniel H. Greenberg a letter dated April 26, 1967, entitled 'Re: Records seized from Lowell M. Birrell.'"

The defendants referred to are Gerardo A. Re and Gerard F. Re.

Mr. Greenberg writes for the purpose of obtaining authorization to have a certain inventory of records made available to him for purposes spelled out in the letter.

Pp. 191-2:

> "Mr. Greenberg: I want to supplement my petition for certiorari with this inventory. I am advised that Mr. Brennan, one of the Court-appointed attorneys for Mr. Birrell, was handed a copy of this 300-odd page inventory of the Birrell records, and he has indicated that he received it under some sort of an informal interdiction from Government counsel that *he will not make it available to anyone else.*
>
> I think *there was a limitation as to showing it even to his client at this point.* [Emphasis supplied]
>
> Mr. Hammerman: That was the original request, your Honor. And then before your Honor there was the refining of that to state that neither the client nor Mr. Brennan would furnish that inventory or show that inventory to anyone else, for the very good reason that until a decision is made by your Honor with regard to whether or not an inventory

as to be provided, there would be no reason to furnish that to anybody.

Mr. Greenberg: Well, I will say parenthetically—

The Court: I will just read from Page 89 of the official reporter's minutes in the Birrell pretrial proceedings on February 15, 1967.

Mr. Hammerman, the Assistant United States attorney, said:

'Your Honor, just for the record, I have furnished Mr. Brennan with a copy of the Government's inventory and I have requested Mr. Brennan, which he has agreed to, (1) not to make a copy of that until this question is resolved, and (2) not to disclose or show it to anybody, and that he is to keep it. . . .'"

P. 193:

"The upshot was that it was agreed that it was satisfactory if Mr. Birrell, who was the defendant, studied the inventory, and want over it with counsel, and gave Mr. Brennan, his lawyer, the benefit of his observations, comments, et cetera. That appears at Page 91.

And that is the way it was left.'"